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Supreme Court, U.S.
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No. 04-1247

In the Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

ABU-ALI ABDUR'RAHMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

Respondent advances several reasons why this Court should deny certiorari on both of the questions presented. None of these reasons is persuasive.

1. Respondent's assertion that certiorari should be denied on Question 1 because this case "is in an essentially interlocutory posture" (Br. Resp. 8) is curious, if not disingenuous. Respondent asserts that "[t]here is no final judgment in the district court" (*Id.*), but it was he who took pains in the district court to seek to obtain just such a judgment. *See* Pet. App. 54a ("[T]his Order is a final Order in all respects, including for purposes of appeal.") Indeed, respondent's own brief reveals this paradox. He says that, after he re-filed his purported Rule 60(b) motion in the district court, he "secured a final judgment" and that the proceedings in the Sixth Circuit involved that court's "review of the district court's final judgment." (Br. Resp. 6 n.5)

The question whether respondent's purported Rule 60(b) motion is in actuality a successive habeas petition has been adjudicated by the courts below. The district court ruled that it was; a majority of the Sixth Circuit ruled that it was not.[1] The Sixth Circuit's remand is not for the purpose of determining "how respondent's Rule 60(b) motion should be handled" (Br. Resp. 9) in the sense, as respondent implies, of revisiting that question, but in the sense only of ruling on the

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[1] Contrary to respondent's claim, except for the fact that the Court of Appeals reversed, rather than affirmed, the district court, the procedural posture of this case is not materially different than that of *Gonzalez v. Crosby, cert. granted*, No. 04-6432 (Jan. 14, 2005).

merits of the motion. The time for this Court to review the successive petition question is now; if respondent's motion is indeed a successive petition, as petitioner maintains, then the district court has no jurisdiction to do what the Sixth Circuit has instructed it to do on remand. *See* 28 U.S.C. 2244(b)(3).[2]

2. Respondent wrongly asserts that there is no need to hold this case pending a decision in *Gonzalez v. Crosby*, *cert. granted*, No. 04-6432 (Jan. 14, 2005). His contention that his Rule 60(b) motion would be cognizable under any of the approaches advocated in *Gonzalez* is patently without merit. Under the rule adopted by the Eleventh Circuit in *Gonzalez*, the rule advocated by the United States as *amicus curiae* in *Gonzalez*, and the rule advocated by the several States as *amici curiae* in *Gonzalez*, a purported Rule 60(b) is properly treated as a second or successive habeas petition when it challenges the correctness of a prior habeas judgment and thus seeks to revisit the merits of that judgment.[3] Respondent's

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[2] Respondent points to this Court's denial of certiorari in *Holland v. Adams*, 541 U.S. 956 (2004). The reasons for the denial in that case are, of course, unknown, but *Adams* can be distinguished on at least one basis: at the time this Court considered, and ultimately denied, the certiorari petition in that case, the Sixth Circuit mandate had issued and the district court had already decided the merits of the Rule 60(b) motion. Here, however, the Sixth Circuit mandate has been stayed pending certiorari.

[3] *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1281 (11th Cir. 2004) (en banc); *see Gonzalez*, No. 04-6432, Brief for the United States as *Amicus Curiae* Supporting Respondent at 14-15; *Id.*, Brief of the States of Tennessee, et al., as *Amici Curiae* in Support of Respondent at 19-20. *See also id.*, Transcript of April 25, 2005, Oral Argument at 44 (statement of Patricia A. Millett, Assistant to the Solicitor General) ("[A] rule 60(b) motion that

Rule 60(b) motion does precisely that — despite the spin he attempts to put on it.[4]

3. Respondent's assertion that any determination by this Court on Question 2 would be of limited impact is answered by the dissent below. If the Tennessee Supreme Court can effectively overrule this Court's decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), by promulgating Tenn.Sup.Ct.R. 39 and, thus, altering retroactively the Tennessee appellate review process, "it would allow Illinois to promulgate its own Rule 39 and reverse the outcome of *O'Sullivan* in that very case." (Pet. App. 33a) Whether Illinois, or any other state, would actually follow suit and promulgate a rule like Rule 39 is beside the point. As the dissent further observed, "[a]vailability [of any particular state remedy] in the final analysis is a question of *federal law*

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seeks to set aside a denial of habeas relief on the grounds that it was incorrectly decided is barred.").

[4] Before the Sixth Circuit, respondent asserted that "the district court's exhaustion ruling is wrong." *Abdur'Rahman v. Bell*, Nos. 02-6547/6548 (6th Cir.) (en banc), Petitioner's Supplemental Brief at 9. Respondent's contention that his 60(b) motion alleges a "defect" in the habeas process that goes to the "integrity" of the habeas proceedings (and thus can be equated to a fraud on the court) represents nothing more than an effort to recharacterize his motion so that it might fit within a recognized exception to the rule against using Rule 60(b) in habeas cases. This effort serves merely to underscore the problem inherent in making any allowance for the use of Rule 60(b) in habeas proceedings: no matter what rule is formulated, every habeas petitioner will argue, as respondent does here, that *his* motion falls within the exception.

that ultimately turns on a 'question of objective historical fact' that no State has the authority to change retroactively." (*Id.*) (citation omitted) (emphasis added).

4. Respondent's final contention is that he is not really seeking retroactive application of Rule 39, in support of which he points to "the authoritative determination of both the Tennessee Supreme Court and the Sixth Circuit that the rule is merely a clarification of pre-existing state law." (Br. Resp. 24) But respondent's own actions in this case belie this contention. First, contrary to any notion that seeking discretionary review from the Tennessee Supreme Court was "unavailable" in 1995, he filed an application seeking such review of the lower court judgment denying him post-conviction relief — he simply failed to include all of his claims. Second, after he raised these neglected claims in his federal habeas petition and they were ruled procedurally defaulted by the district court due to his failure to seek discretionary review in state court, he took no appeal from this ruling — again, contrary to any notion that existing state law relieved him of the obligation to have sought such review.[5] Third, after the Tennessee Supreme Court promulgated Rule 39, providing that "a litigant shall not be required [to seek discretionary review] in order to be deemed to have exhausted all available state remedies" (Pet. App. 61a), respondent sought to reopen his procedurally defaulted claims. The *only* conclusion to be drawn from this set of

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[5] Respondent asserts that any such appeal would have been futile in light of "longstanding Sixth Circuit precedent" (Br. Resp. 13 n.8), presumably, that which held discretionary review an available state remedy that must be sought in order to exhaust. But such a futility argument assumes that existing Tennessee law was in accord with this Sixth Circuit precedent.

circumstances is that respondent is seeking retroactive application of Rule 39.

Respondent's contention that certiorari should be denied because he is not seeking to have Rule 39 retroactively applied draws no support from the Sixth Circuit majority's determination that Rule 39 merely clarified existing state law, for this is the very decision that petitioner seeks to have this Court review. And his reliance on the so-called "authoritative determination" of the Tennessee Supreme Court to the same effect is likewise misplaced. The court made no such determination. Though respondent repeatedly insists that "the Tennessee Supreme Court explicitly noted that it was clarifying rather than changing existing law" (Br. Resp. 24-25; *see also id.* at 25, 26), the court clarified nothing of the sort, as discussed in the petition. (Pet. 15-16) Nowhere in the Rule or the preamble to the Rule does the court state, expressly or otherwise, that it is clarifying pre-existing state law. On the other hand, the Rule does indicate that it shall apply retrospectively, *i.e.*, "[i]n all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967." (Pet. App. 61a)

CONCLUSION

For the reasons stated here and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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